

**REMARKS**

In addition to the amendments to the claims illustrated above, a new claim 45 is now offered for review.

Claims 1, 3, 9-12, 25, 28-30, 33-35 and 37-45 were pending in the subject application. Claims 1, 45 have been amended. Accordingly, upon entry of this Amendment 3, 9-12, 25, 28-30, 33-3 and 37-45 will be pending and under examination.

Applicant maintains that the amendments to claims 1, and 45 do not add new matter, and that these claims are supported by the specification as originally filed.

**Rejections Under 35 U.S.C. §102**

In the June 11, 2007 Office Action, the Examiner rejected claims 1 and 45 under 35 U.S.C. §102 as the invention was patented or described in a printed publication in this or a foreign country or in public use or sale in this country, more than one year prior to the date of application for patent in the United States. The Examiner stated the claims are anticipated by Brown (U.S. 3,424,005). The Examiner alleged Brown discloses the applicant's claim that the user engageable member including a user engageable member (16) including a first end, an intermediate section, and a second end, a support attached at a first end to the user engageable member at a perpendicular angle, wherein the second end of the support is capable of slidably connecting to the support structure to allow a user to

slidably move the support and the user engageable member to a desire position, wherein the connected support to the support structure renders the user engageable member substantially immovable, the bar inherently providing a means for distributing the strongest range of muscular force, means for measuring the strongest range of muscular force, and means for displaying the strongest range of muscular force.

**Response:**

The claims have been amended to vitiate any further rejection under 35 U.S.C. Section 102 (See Listing of Claims)

Under 35 U.S.C. Section 102, a claim is anticipated when a single prior art reference discloses each and every element of the claimed invention. *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 715, 223 U.S.P.Q. 1264, 1270 (Fed. Cir. 1984). If the reference fails to suggest even one limitation of the claimed invention, then the claim is not anticipated. *Atlas Powder Co. v. E.I. du Pont De Nemours & Co.*, 750 F.2d 1569, 1574, 224 U.S.P.Q. 409, 411 (Fed. Cir. 1984).

As illustrated below, the Brown reference fails to suggest every limitation of the claimed invention and thus cannot qualify as a reference under 35 U.S.C. §102. As illustrated herein, the Brown (U.S. 3,424,005) lacks quintessential features of applicant's invention, as duly claimed, and thus the rejections under 35 U.S.C. §102 should be removed.

The user engageable member disclosed by Brown (U.S. 3,424,005) encompasses "a resilient fiberglass bar or pole". (Brown U.S. 3,424,005; Column 1, Line 70). Brown further discloses that the "bar is subjected to a substantial bending movement and being of resilient material it will flex considerably" (Brown U.S. 3,424,005; Column 2, Line 6). Thus, Brown was intentionally designed to encompass a bar which clearly would not permit uniform distribution of the strongest range of muscular force.

Conversely, applicant's invention is intentionally designed, and clearly claims, a user engageable, non-resilient member that ensures uniform distribution of muscle force. Thus, applicant's invention as claimed allows for highly accurate measurement, storage and retrieval of muscle force.

Additional differences which bar anticipation exist. First Brown differs since, where Brown may disclose the use of a measuring device in line with a visual display of the force applied, Brown fails to disclose the capability to store the measurements.

Second, Brown does not provide the ability of utilization by a plurality of users, as being claimed in the present invention. Thus, once again, as the Brown reference fails to disclose each and every element of the claimed invention, Brown must fail as a reference for 35 USC §102 purposes.

Finally, herein the applicable claims have been amended accordingly to integrate this facet of the invention, as illustrated above. Therefore, as the Brown reference fails to disclose each and every element of the claimed invention, here, Brown must fail as a reference for 35 USC §102 purposes.

Further, in the June 11, 2007 Office Action, the Examiner also rejected claims 45 and 3/45 under 35 U.S.C. 102 (b) as being anticipated by Brown (U.S. 2002/0055424). The Examiner alleges that Brown discloses a support structure including a user engageable member including a first end, an intermediate section, and a second end, a means for slideably connecting the first end of the user engageable member to the support structure at a user desired position to a first chain connected to the support structure wherein said means allows the user to connect and disconnect the first end of the user engageable member from the first chain.

The Examiner also alleges that Brown discloses a means for slidably connecting the second end of the user engageable member to the support structure at the user desired position to a second chain connected to the support structure wherein the means allows the user to connect and disconnect the second end of the user engageable member at the user desired position from the second chain, further wherein the first chain and the second chain are connected to the support structure so as to allow the

force of each chain to offset the other chain to render the user engageable member substantially immovable by a muscular force applied by the user, the bar inherently providing a means for distributing the strongest range of muscular force, means for measuring the strongest range of muscular force, and means for displaying the strongest range of muscular force. Referring to claim 3, the Examiner alleges Brown discloses the support structure including a base to support a user.

**Response:**

Under 35 U.S.C. Section 102, a claim is anticipated when a single prior art reference discloses each and every element of the claimed invention. *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 715, 223 U.S.P.Q. 1264, 1270 (Fed. Cir. 1984). If the reference fails to suggest even one limitation of the claimed invention, then the claim is not anticipated. *Atlas Powder Co. v. E.I. du Pont De Nemours & Co.*, 750 F.2d 1569, 1574, 224 U.S.P.Q. 409, 411 (Fed. Cir. 1984).

Brown (U.S. 2002/0055424) discloses a user engageable member (24) including a first end, intermediate section and a second end. However, antiBrown fails to disclose a method to slidably connect the user engageable member to the support structure. The user engageable member is anchored to the adjustable straps (or chains) (12, 12a). These which do not offer the means to attach slidably to a user desired position.

The first end, intermediate sections and second end as referred to by Brown (U.S. 2002/0055424) differ significantly from what is being claimed in the present invention. The first end, intermediate section and the second end of current invention all pertain to the user engageable non-resilient member (3 and 11) as opposed to Brown where the first end and second end refer to the adjustable straps (12 and 12a) (analogous to the support system (5) of present invention) and the intermediate section is the actual user engageable member (24) (analogous to the user engageable member (3) of the present invention). Hence these first end, second end and the intermediate sections cannot be compared by mere terms. Further these adjustable straps (12 and 12a), the so called first and second end of Brown's invention are not connected to the support (10). They are attached to cables (16 and 16a) that link up to pulleys (18 and 18a) and the load cell (20) via slots formed through the support (10). The adjustable straps (12 and 12a) are not immovable in comparison to the support (5) being claimed in present invention, the latter rendered substantially immovable by anchoring at both ends to the support structure (1).

Therefore, as the Brown reference fails to disclose each and every element of the claimed invention, thus Brown must fail as a reference for 35 USC §102 purposes.

**Rejections under 35 USC §103:**

In the June 11, 2007 Office Action, the Examiner rejected claims 3, 9-12, and 25, 28-30, 33-35, and 37-44/1 under 35 U.S.C. 103 (a) as being unpatentable over Brown (U.S. 3,424,005) in view of Noffsinger (U.S. 4,647,039). The Examiner alleges Brown teaches the claimed invention but fails to teach the support including a base. The Examiner alleges that Noffsinger teaches in an analogous device the desirability of providing a base in order to provide support for a user. The Examiner alleges that in view of the teachings of Noffsinger, it would have been obvious to one of ordinary skill in the art at the time of the invention to provide Brown with a base in order to provide support.

**Response:**

In regard to Brown (U.S. 3,424,005), as illustrated above pertaining to the §102 rejections, applicant has clearly illustrated that Brown (U.S. 3,424,005) does not disclose each and every element of the claimed invention. Thus, combination of any art with Brown (U.S. 3,424,005), de facto, will not cover all of the elements, particularly in light of the amendments to the claims.

Further, referring to Referring to claims 9-12, Brown fails to teach means for storing data, and retrieving data, and for identifying a plurality of users. Noffsinger teaches the desirability of providing means for storing and retrieving data

for a plurality of users through a computer. The Examiner alleges it would have been obvious to one of ordinary skill in the art at the time of the invention to provide means for storage and retrieval of exercise data as taught by Noffsinger to the device of Brown in order to allow a user to track progress of exercise over a course of time.

Finally, neither Noffsinger nor Brown discloses use of a portable measuring device with multiple apparatuses. Investigation of the specification of the instant invention reveals that the preferred embodiment disclosed is one where the portable measuring device with multiple apparatuses of the must occur.

Claims must be read in view of the specification, of which they are part. *SciMed Life Systems, Inc. v. Advanced Cardiovascular*, 242 F.3d 1337, 1340 (Fed. Cir. 2001). Where the specification makes clear that the invention does not include a particular feature, that feature is deemed to be outside the claims of the patent, even though the language of the claims, read without reference to the specification, might be considered broad enough to encompass the feature in question. See *Id.* at 1341.

"Claims should be interpreted consistently with the specification, which provides content for the proper construction of the claims because it explains the nature of the

patentee's invention" *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 102 F. Supp. 2d. 199, 209 (D. Del. 2000). "[C]laims should not be construed to encompass embodiments beyond those that are described and enabled in the specification" *Id.* at 215.

Therefore, in accordance with proper interpretation of claim breadth, where the specification clearly illustrate use of a portable measuring device with multiple apparatuses, and where neither Brown, nor Noffsinger, teach use of a portable measuring device with multiple apparatuses, the combination of Brown in light of Noffsinger fails to qualify as a reference for obviousness purposes.

Referring to claims 25, 28-30, 33-35, and 37-44/1, the Examiner alleges that Brown as modified by Noffsinger reasonably conveys an exercise method involving exerting a force in the position of strongest range of motion, recording the value of the force, inherently abstaining for a period of time as is well known in the art, and exerting a second force and recording its value, and exercising a second abstention period. The Examiner alleges that specific limitations drawn to having the first or second force exerted being the maximum force are considered obvious to one of ordinary skill in the art, as the skilled artisan could choose from a variety of well known exercise principles such as 'pyramiding up' in wherein subsequent exertions are greater, or 'pyramiding down' wherein subsequent

exertions are lessened. With respect to claims 28 and 33, the Examiner alleges specific time of exercise is variable and one of ordinary skill in the art would choose a desired period of exertion based on the level of exercise desired. With respect to claims 29 and 34, the Examiner alleges in exercise routines, exerting a force until complete muscle fatigue is a well known principle in the art.

Finally, Noffsinger encompasses a rotary motion and fails to

Regarding claims 30 and 35, the Examiner alleges the step of exercising and stopping at the onset of pain would have been obvious to one of ordinary skill in the art as the skilled artisan would not want to risk injury during exercise exertion. With respect to claims 37-44, the Examiner alleges the specific period of abstention is a matter of obvious design choice as one of ordinary skill would select a period of abstention based on their individual recovery time, based on personal levels of fitness as well as levels of exertion during exercise, as one who exerts more force will likely be more sore and require a greater recovery time, hence a greater abstention period.

**Response:**

Under 35 U.S.C. 103 (a) a patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between

the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The examiner alleges that "Noffsinger reasonably conveys an exercise method involving ... inherently abstaining for a period of time as is well known in the art, and exerting a second force and recording its value, and exercising a second abstention period." In it's entirety, Noffsinger makes **no** reference to exercise, interspersed with abstinence, as a method for use of the instrument disclosed.

Once again the specification of the instant invention mandates clear difference in the alleged references. Claims must be read in view of the specification, of which they are part. *SciMed Life Systems, Inc. v. Advanced Cardiovascular*, 242 F.3d 1337, 1340 (Fed. Cir. 2001). AS illustrated in the specification and claims of the instant invention, the detailed exercise regimen claimed in the present invention is directly calculated based on the initial force exerted by the user. The abstentions periods are clearly prescribed based on the initial muscular force exerted by the user and thus the exercise regimen detailed is very critical for the proper and effective use of

the apparatus.

Further the abstinence periods are not dependant on the users determination of recovery times as alleged by the examiner, as mentioned before these periods are determined based on the initial muscle force exerted by the user.

In citing Noffsinger, it appears that the Examiner relies upon reference to an ability to utilize Noffsinger as an isometric apparatus. (Noffsinger, Column 5, Line 54) However, Noffsinger fails to illustrate any exercise program or regimen or even guidelines for utilization as the apparatus in an isometric manner. Therefore, this mere statement, without proper support and illustration cannot meet the rigors of 35 USC §112 enablement and thus not a reference for that form of invention.

The enablement requirement refers to the requirement of 35 U.S.C. 112, first paragraph that the specification describe how to make and how to use the invention. M.P.E.P. 2164. The purpose of the requirement that the specification describe the invention in such terms that one skilled in the art can make and use the claimed invention is to ensure that the invention is communicated to the interested public in a meaningful way. M.P.E.P. 2164. The information contained in the disclosure of an application must be sufficient to inform those skilled in the relevant art how to both make and use the claimed invention.

Clearly, as but one line within Noffsinger is devoted to utilization of the Noffsinger invention as an isometric apparatus, clearly neither the interested public nor those skilled in the relevant art would know how to make and use an isometric invention from the disclosure of Noffsinger. Therefore, the dearth of teaching in Noffsinger or Brown dictate that the combination of these references fails to render the instant invention, as claimed, obvious.

Further, in Noffsinger, the linkage design fails to allow the members to be engagable and thus there exists no positive locking mechanism for positioning. Instead Noffsinger, at best, encompasses a friction based mechanism, and at worst, inherently, encompasses no locking positioning mechanism. In fact, such a design encompassing a friction based mechanism would not work without significant machine scaring in the 500 lb to 1000 lb ranges that are common for strongest range exercises. Additionally, the indicated 5 horsepower motor is far to weak to properly counteract the motor arm at strongest range levels of force.

Isometric exercise or "isometrics" are a type of strength training in which the joint angle and muscle length do not change during contraction (compared to concentric or eccentric contractions, called isotonic movements). Isometrics are done in

static positions, rather than being dynamic through a range of motion. The joint and muscle are either worked against an immovable force (overcoming isometric) or are held in a static position while opposed by resistance (yielding isometric). Thus, the rotary motion exhibited in Noffsinger, in conjunction with the above argumentative matter further illustrate a lack of an isometric system.

Additionally, with respect to the rest period as disclosed in the instant invention, the rest period is not arbitrary, and is, in fact, algorithmically determined based on the maximum output obtained in successive workouts which are intentionally spaced apart by a determined period of time. Thus when that measured output doesn't rise (other than due to illness, or some long, unintended lapse in workouts) the time between workouts increases. Thus, when reading these embodiments into the claims of the instant application, no disclosure exists within Noffsinger or Brown, or any combination thereof to render the instant claims obvious.

Moreover, the maximum effort is not arbitrary, (as suggested by the Examiner) but instead requires the strongest range of motion exercises and corresponding values. It is the objective and reproducible nature of these strongest range of motion values, and their intensity, that both provides the necessary muscle stimulation to produce high growth rates and

also provides the necessary accuracy of feedback to provide accurate scheduling. It is only in the strongest range isometrics that maximum effort has objective, unambiguous meaning. It isn't just some arbitrary, all out effort, but rather it represents the result of the highest obtained value possible within an exercise, an exercise that must be isometric to give an unambiguous reproducible maximum force reading. Clearly, no disclosure exists within Noffsinger illustrating a device that was optimized for these operations. Instead there is every indication that the Noffsinger device would require significant modifications, most notably providing the positional locking mechanisms. And once so modified the majority of Noffsinger mechanisms are non-operational.

In further correlation with applicant's assertion regarding the lack of a locking mechanism, Noffsinger fails to illustrate an impinging, locking mechanism, and instead depicts only that the motor and the side lever arms provide the positioning. As this lever arm design necessitates that the entire unit be too large for the typical home usage, Nosfinger clearly does not vitiate a simpler, smaller isometric device, suitable for home use.

Therefore, in summary Noffsinger's existing locking mechanisms are inadequate for strongest range of motion exercises, and that they are clumsy, overly expensive,

oversized, and way over weight for even weakest range isometric exercises in general indicates that Noffsinger in no way anticipated this design.

**CONCLUSION**

In view of the applicant's remarks and amendments to the claims, applicant respectfully requests the Examiner to remove the listed grounds of rejection.

If a telephone interview would be of assistance in advancing prosecution of the subject application, applicant's undersigned attorney invites the Examiner to contact the office at the number provided below.

As discussed above, Applicant encloses a check for \$525 for the three-month extension. If any additional fee is required, authorization is hereby given to charge the amount of any such fee to the Deposit Account 12-0115.

Respectfully submitted,

Date: \_\_\_\_\_  
Lambert & Associates, PLLC  
92 State Street  
Boston, MA 02109-2004  
Tel.: 617-742-8782

\_\_\_\_\_  
Gary E. Lambert, Esq.  
Registration No. 35,925  
Attorney for the Applicant